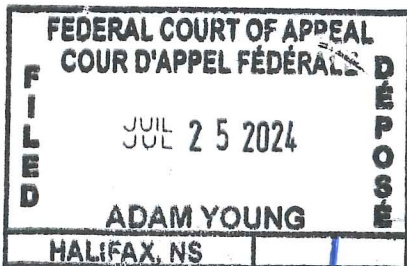


COURT FILE NO.: A-244-24

FEDERAL COURT OF APPEAL

BETWEEN: 1D#1



CHRISTOPHER R. THERIAULT

Applicant

and

ATLANTIC TOWING LIMITED

Respondent

APPLICATION under Sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, C F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this Application be heard at the Federal Court of Canada, Courtroom # 501, The Law Courts Building, 1815 Upper Water Street, Halifax, Nova Scotia, B3J 1S7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or a solicitor acting for you must file a Notice of Appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

2

July 25, 2024

ORIGINAL SIGNED BY
ADAM YOUNG
ORIGINAL SIGNÉ PAR

Issued by: _____

Address of
local office:

1720, 1801 Hollis Street
Halifax, NS B3J 3N4

TO: Atlantic Towing Limited
c/o Kelly Van Buskirk, K.C.
Lawson Creamer
133 Prince William Street, Suite 801
Saint John, NB E2I 2B5

4029269

APPLICATION

This is an Application pursuant to Sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, C F-7 for judicial review in respect of a decision of the Canada Industrial Relations Board (the "Board") dated June 28, 2024 (the "Decision"; Neutral Citation: 2024 CIRB 1143), which dismisses the Applicant's unjust dismissal complaint (the "Complaint").

In the Decision, the Board:

1. Declined to allow the Applicant to amend his Complaint to withdraw his allegations of a failure to accommodate a requested religious exemption;
2. Found that another procedure for redress was available to the Applicant; and
3. Found that it did not have the jurisdiction to consider the Applicant's Complaint.

The Decision was communicated to the Applicant on June 28, 2024.

The Applicant makes application for:

1. An Order setting aside the Decision and referring it back for determination in accordance with such directions as it considers to be appropriate pursuant to Sections 18(3) and 18.1(3) of the *Federal Courts Act*, RSC, 1985, C F-7; and
2. Providing such further and other relief as this Honourable Court may deem fair and just in the circumstances.

The grounds for the Application are:

1. That the Board's Decision was unreasonable wherein it declined to allow the Applicant to amend his Complaint to withdraw his allegations of a failure to accommodate a requested religious exemption. The Board does not provide sufficient reasons for how the amendment would change the nature of the Complaint in a way that would result in a breach of the principles of natural justice in accordance with the jurisprudence that it relies on.
2. That the Board's Decision was unreasonable wherein it found that the aspects of the Complaint not related to the request for religious exemption were tangential and not stand-alone issues for consideration.
3. That the Board's Decision was unreasonable wherein it found to allow the Applicant to amend his Complaint (to withdraw his allegations of a failure to accommodate a requested religious exemption) would undermine the *Canada Labour Code*, RSC, 1985, c. L-2. The Board does not provide any explanation or support for this proposition.

4. That the Board's Decision was unreasonable wherein it found that to allow the Applicant to amend his Complaint (to withdraw his allegations of a failure to accommodate a requested religious exemption) would allow the Complaint to fall within its jurisdiction and then relied on this subject matter to find it did not have jurisdiction to consider the Complaint. In this regard, the Board's Decision provides circular reasons which lack transparent and intelligible justification.
5. That the Board breached its duty of procedural fairness to the Applicant by declining to allow the Applicant to amend his Complaint (to withdraw his allegations of a failure to accommodate a requested religious exemption) and then relying on that same subject matter to find that it did not have jurisdiction to consider the Complaint.
6. That the Board breached its duty of procedural fairness to the Applicant by finding that it did not have jurisdiction to consider the Complaint more than two years after the Complaint was filed. The Board found that the Applicant had another procedure for redress under the *Canadian Human Rights Act*, RSC, 1985, c. H-6. Yet this procedure was time-barred by the time of the Board's Decision effectively denying the Applicant any recourse.
7. Such further and other grounds as counsel may advise and this Honourable Court may allow.

This Application will be supported by the following material:

1. Affidavit of the Applicant, Christopher R. Theriault, to be sworn; and
2. Such other material as counsel may advise and this Court may allow.

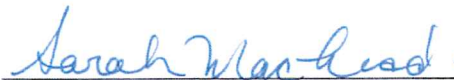
The Applicant requests that the Board send a certified copy of any material relevant to the present Application that is not in the possession of the Applicant, but is in the possession of the Board, to the Applicant and to the Registry, including, but not limited to, any and all material that was before the Board in the issuance of its Decision.

Date: July 25, 2024

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 25

day of July A.D. 2024

Dated this 25 day of July 2024



Sarah MacLeod
Burchell Wickwire Bryson LLP
1900-1801 Hollis Street
Halifax, NS B3J 3N4
Phone: 902-423-6361
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Adam Young
Registry Officer
Agent du greffe



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Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Our File: 035901-C
Document No.: 0667636-D
June 28, 2024

BY WEB PORTAL

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B4A 1C6

Kelly VanBuskirk, K.C.
Lawson Creamer
Lawyers
Suite 801
133 Prince William Street
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E2L 2B5

In the matter of the *Canada Labour Code (Part III—Standard Hours, Wages, Vacations and Holidays)* and the referral to the Canada Industrial Relations Board of a complaint of unjust dismissal made under section 240(1) by Christopher R. Theriault, complainant; Atlantic Towing Limited, respondent. (035901-C)

After consideration of all of the submissions of the parties concerned, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board (the Board), composed of Jennifer Webster, Vice-Chairperson, sitting alone pursuant to section 14(3.1) of the *Canada Labour Code*.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,

Gabrielle Lacasse
Manager of operations and conflict
resolution (Registrar)

Encl.

c.c.: Danijela Hong (ESDC—Labour Program) (By Web Portal)
Jennifer Wright



C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Christopher R. Theriault,

complainant,

and

Atlantic Towing Limited,

respondent.

Board File: 035901-C

Neutral Citation: 2024 CIRB 1143

June 28, 2024

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Jennifer Webster, Vice-Chairperson, sitting alone pursuant to section 14(3.1) of the *Canada Labour Code* (the *Code*).

Counsel of Record

Ms. Laura H. Neilan, for Mr. Christopher R. Theriault;

Ms. Kelly VanBuskirk, K.C., for Atlantic Towing Limited.

[1] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

I. Nature of the Complaint

[2] On April 4, 2022, Mr. Christopher R. Theriault (the complainant) filed a complaint of unjust dismissal with the Labour Program of Employment and Social Development Canada (ESDC) alleging that he had been unjustly dismissed by Atlantic Towing Limited (the respondent), contrary to section 240(1) of Part III (Standard Hours, Wages, Vacations and Holidays) of the *Code*.

Canada

[3] The ESDC referred the complaint to the Board on July 19, 2022, after the complainant requested adjudication.

[4] This decision addresses two preliminary issues. Firstly, the Board will consider the complainant's request to withdraw the portions of his complaint related to allegations that the respondent discriminated against him based on his religious beliefs. Secondly, it will consider whether section 242(3.1)(b) of the *Code* deprives it of jurisdiction to consider the complaint because another procedure for redress is available to the complainant under the *Canadian Human Rights Act* (the Act).

II. Background and Facts

[5] The respondent is a marine operator with headquarters in Saint John, New Brunswick. The complainant started working as a crew member on the respondent's vessels in August 2011.

[6] On October 6, 2021, the Government of Canada announced that, as of October 30, 2021, it was requiring all employers in the federally regulated air, rail and marine transportation sectors to establish vaccination policies for their employees. The respondent implemented a COVID-19 vaccination policy, in accordance with this requirement. Under the terms of the respondent's policy, all employees were required to provide proof of a first vaccination dose by November 15, 2021, and of a second vaccination dose by January 15, 2022. If an employee did not provide proof of vaccination against COVID-19, they would not be permitted to board the respondent's vessels.

[7] The respondent's policy provided for medical and religious exemptions from the vaccination requirement as follows:

Legitimate medical and religious exemptions to vaccination requirements which meet the criteria established by applicable federal, state or provincial authorities will be considered and accommodated on a case-by-case basis. Anyone who is medically exempted from vaccination must submit in writing proof of exemption for review and, if approved, submit to a testing regime in accordance with company policy in effect at that time. Anyone seeking a religious exemption should submit the Transport Canada Religious Exemption Request Form for review and, if approved, submit to a testing regime in accordance with company policy in effect at that time.

[8] On November 16, 2021, the complainant submitted a completed Religious Exemption Request Form to the respondent, claiming a religious exemption from the vaccination requirement. The respondent investigated the complainant's request in a meeting with him on December 8, 2021.

[9] Ms. Sarah Zaat, the respondent's Director of Human Resources, wrote to the complainant on December 13, 2021, to advise him that his request for a religious exemption had been denied. She further advised him that the respondent was providing him with a final opportunity to begin the vaccination process by confirming on or before December 15, 2021, that he had booked a vaccination appointment. Ms. Zaat concluded the letter by outlining the consequences of failing to provide proof of vaccination:

If you have no intention of providing proof of vaccination you can let me know immediately and I will process your termination. If I do not hear from you on Wednesday and / or have not received proof of vaccination by end of day Friday December 17th, your termination will be processed on Monday December 20th, 2021. All monies owed will be paid out on your final pay and all benefits, etc. will cease upon your termination date.

[10] On January 5, 2022, Ms. Zaat had a telephone conversation with the complainant in which he informed her that he would not be getting the vaccine. She advised him in this conversation that, due to his non-compliance with the mandatory vaccination policy, the respondent would be terminating his employment effective January 6, 2022. On March 14, 2022, Ms. Zaat provided the complainant with written confirmation that his employment was terminated.

[11] The complainant filed the unjust dismissal complaint on April 4, 2022. After the ESDC referred the complaint to the Board for adjudication, the Board wrote to the parties to acknowledge receipt of the referral and to request further submissions on the issues raised in the complaint.

[12] Following receipt of the parties' submissions, the complaint was referred to a panel of the Board for consideration.

[13] The Board held a case management teleconference with the parties on March 4, 2024. At the teleconference, the Board advised the parties that, based on its review of the issues outlined in the complaint and the parties' submissions, it had identified a question about its jurisdiction to consider the unjust dismissal complaint. In particular, the Board noted that section 242(3.1)(b) of the *Code* prohibits it from considering complaints where another procedure for redress is available to the complainant under Part I (Industrial Relations) or Part II (Occupational Health and Safety) of the *Code* or under another federal Act. The Board specifically questioned whether a procedure for redress was available to the complainant under the Act because the unjust dismissal complaint raised issues of discrimination based on religion. Given that it had identified a jurisdictional issue,

the Board requested submissions from the parties about the application of section 242(3.1)(b) of the *Code* to its ability to hear and determine the unjust dismissal complaint. It also advised the parties of two Board decisions that had considered the interpretation and application of section 242(3.1)(b) (see *Brown*, 2020 CIRB 948; and *Hayes*, 2021 CIRB 961).

[14] Both parties provided submissions on the Board's jurisdiction. In addition to providing submissions on the application of section 242(3.1)(b) of the *Code*, the complainant requested to withdraw any part of his complaint that referenced human rights allegations or a failure to accommodate his religious beliefs. He specifically advised the Board that he was abandoning his position that the respondent should have accommodated his religious exemption request, and he clarified that he wished to proceed based on his claim that the respondent should have exempted him from the application of the vaccination policy for practical reasons. He also argued that the respondent should have placed him on an unpaid leave of absence in response to his non-vaccination because the termination of his employment was an excessive response in all the circumstances.

III. Analysis and Decision

[15] There are two preliminary issues to be determined in this complaint:

- a. Should the Board permit the complainant to amend his complaint by withdrawing his human rights allegations?
- b. Does section 242(3.1)(b) of the *Code* apply to deprive the Board of jurisdiction to consider the complaint?

A. The Complainant's Request to Amend His Complaint

[16] In his submissions on the Board's jurisdiction, the complainant asks the Board to allow him to amend his complaint by withdrawing all allegations relating to the respondent's denial of his request for an exemption from vaccination for religious reasons. In essence, he seeks to withdraw all claims that the respondent acted in a discriminatory manner when it terminated his employment.

[17] The respondent opposes the complainant's request to withdraw the aspects of his complaint related to human rights allegations. It argues that the human rights allegations are central to the

unjust dismissal complaint and that the complainant is only seeking to withdraw them to avoid a finding that the Board does not have jurisdiction due to the application of section 242(3.1)(b) of the *Code*.

[18] Section 16 of the *Code* sets out the Board's general powers. These powers include the power under section 16(n) "to amend or permit the amendment of any document filed in connection with the proceeding."

[19] The Board summarized its approach to the amendment of documents in *WestJet, an Alberta Partnership*, 2019 CIRB 898, as follows:

[32] Section 16(n) of the *Code* authorizes the Board "to amend or permit the amendment of any document filed in connection with the proceeding." The Board discussed its authority under this section in several decisions and clarified that this legislative provision does not permit the Board to allow amendments that would have the effect of changing the nature of the original application or which would result in a breach of the principles of natural justice. Likewise, it is not to be used to allow new allegations in the context of an existing proceeding that would otherwise be inadmissible (see *Castro-Martin et al.* (1992), 88 di 104 (CLRB no. 943)).

[20] As outlined above, the Board will exercise this power where the amendments do not change the nature of the application or complaint, introduce new allegations or breach the principles of natural justice.

[21] The complainant outlined the details of his unjust dismissal complaint in the form and supporting documents that he submitted to the ESDC on April 4, 2022. He also filed submissions with the Board about the issues raised in his complaint in September 2022. In all these documents, he identified that the respondent had denied his request for a religious exemption from vaccination and that, consequently, it had terminated his employment for failure to comply with the vaccination policy.

[22] The complainant explained why he believed the termination of his employment was an unjust dismissal in an attachment to the original complaint form. After identifying that his employment was terminated on January 6, 2022, because he refused to be vaccinated, he described the circumstances related to his termination as follows:

I filled out an exception for Religious Reasons through Transport Canada Religious Exemption Request on November 16th, 2021.

Approximately three weeks later I was interrogated by Atlantic Towing in a recording conference call. The outcome of this call is noted in one of the letters I have included, there opinion and thoughts about my religious beliefs superseded mine and I was terminated.

Up until the Federal vaccine mandate I had been travelling between Nova Scotia and St. John New Brunswick for my shift on ships undergoing home isolations and testing protocol which accommodated for the interprovincial regulations for the unvaccinated with no issues therefore this system could have been continued to accommodate my employment with Atlantic Towing Ltd, which I have been a 10-year employee.

[23] The complainant also filed his completed Religious Exemption Request Form in support of his unjust dismissal complaint. In this form, he identified that the respondent's vaccination policy conflicted with his sincerely held religious beliefs. He attached a note to the request form that provided additional information about his religious beliefs and referred to decisions of the Supreme Court of Canada related to freedom of religion.

[24] The complainant's submissions to the Board in September 2022 were consistent with how he had described the issues in his original unjust dismissal complaint. He expressly identified that his religious beliefs were sincerely held and that the respondent had determined that these beliefs were irrelevant to the application of the vaccination policy.

[25] It is the Board's view that the essential nature of the present complaint is a claim that the respondent unjustly dismissed the complainant by refusing his request for a religious exemption from vaccination. The facts and issues outlined in the original complaint and in the complainant's submissions establish that the complaint is fundamentally about the complainant's claim that the respondent discriminated against him based on his religious beliefs. The complainant has raised issues in addition to the allegations about the respondent's refusal to grant the religious exemption. These additional issues are claims that the respondent should have placed him on an unpaid leave of absence rather than terminating his employment and should have exempted him from the vaccination requirement because he tested regularly as an interprovincial traveller and his work duties did not involve working with other people. These issues are tangential to the core issue, which is the complainant's claim that the respondent acted improperly when it denied his request for a religious exemption.

[26] The Board finds that, in requesting to withdraw all allegations related to the religious exemption, the complainant is seeking an amendment that would change the nature of the original

complaint. In addition, it is the Board's view that to allow this amendment would undermine the express language of section 242(3.1)(b) of the *Code*, which prevents the Board from considering an unjust dismissal complaint where another procedure for redress, including a human rights complaint under the Act, is available to the complainant. Therefore, the Board will not exercise its authority to permit the requested amendment because the allegations about the respondent's decision to deny the complainant's request for a religious exemption are at the core of the complaint.

B. Section 242(3.1)(b) of the Code

[27] Section 242(3.1) of the *Code* restricts the Board's jurisdiction to consider unjust dismissal complaints in certain circumstances:

242 (3.1) No complaint shall be considered by the Board under subsection (3) in respect of a person if

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(b) a procedure for redress has been provided under Part I or Part II of this Act or under any other Act of Parliament.

[28] The Board identified a jurisdictional issue in the present complaint based on its review of the materials filed by the parties. In particular, it noted that the complainant described that, after refusing his request for a religious exemption, the respondent terminated his employment for not complying with the mandatory vaccination policy. As noted above, the essence of the unjust dismissal complaint is that the respondent refused to accommodate the complainant's sincerely held religious beliefs when it denied his request for an exemption from the vaccination policy.

[29] The Board reviewed the interpretation and application of section 242(3.1)(b) of the *Code* in *Brown and Hayes*. Based on this review, it identified that there are two questions to be addressed when considering the application of section 242(3.1)(b) to its jurisdiction to consider unjust dismissal complaints: whether the complaint is essentially the same in the other procedure for redress, and whether the other procedure provides real redress of personal benefit to the same complainant.

1. Is the complaint essentially the same in the other procedure for redress?

[30] The complainant has not filed a human rights complaint under the Act. Therefore, in considering the first question of whether the complaint is essentially the same in the other procedure for redress, the Board must determine whether the issues raised in the unjust dismissal complaint could reasonably form the basis of a substantially similar complaint under Part I or Part II of the *Code* or under another federal Act (see *MacFarlane v. Day & Ross Inc.*, 2010 FC 556 (*MacFarlane*)).

[31] The Board views the complainant's unjust dismissal complaint as a claim that the respondent engaged in discriminatory conduct contrary to the Act. Section 7 of the Act provides as follows:

7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

[32] The list of prohibited grounds of discrimination is found in section 3(1) of the Act, and religion is identified as a prohibited ground in this list. The complainant claims that he was unjustly dismissed because the respondent refused his request for a religious exemption. This is a claim of discrimination in employment based on religion.

[33] The Board finds that the issues raised in the unjust dismissal complaint could reasonably form the basis of a substantially similar complaint under the Act, that is, a complaint that the respondent violated the Act by refusing the complainant's exemption request and terminating his employment for reasons related to his religious beliefs. Although the complainant has not elected to file a human rights complaint about these events, there is a process available to him under the Act to pursue a claim of discrimination related to the termination of his employment. On the first question in the analysis of the application of section 242(3.1)(b) of the *Code*, the Board concludes that the procedure available to the complainant under the Act is essentially the same as the unjust dismissal complaint procedure under the *Code*.

2. Does the other procedure provide real redress?

[34] The second question of whether a complaint under the Act provides real redress was addressed in *Brown* and *Hayes*. In both decisions, the Board found that a complaint under the Act provides real redress to a complainant through the broad remedial powers outlined in section 53 of the Act.

[35] The language of section 242(3.1)(b) of the *Code* is imperative. The use of the word "shall" is an express indication that the Board must refuse to hear the unjust dismissal complaint if another procedure for redress is provided under Part I or Part II of the *Code* or under another federal Act. Consequently, the Board finds that it must decline jurisdiction over the present complaint due to the application of section 242(3.1)(b).

3. The Board's Residual Jurisdiction

[36] Despite the prohibition on its jurisdiction in section 242(3.1)(b) of the *Code*, the Board does have residual jurisdiction with respect to unjust dismissal complaints in certain circumstances. The Board explained this residual jurisdiction in *Brown*, with reference to the Federal Court's decision in *MacFarlane*:

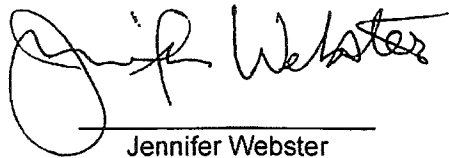
[26] The FC [in *MacFarlane*] did find, however, that the adjudicator had an ancillary jurisdiction to hear the unjust dismissal complaint based on the statutory discretion provided to the CHRC [Canadian Human Rights Commission] under the Act. The FC stated that, pursuant to section 41(1)(b) or 44(2)(b) of the Act, the CHRC has the discretion to refer the complaint to an adjudicator if it appears "that it could be more appropriately dealt with in the context of a hearing held pursuant to section 242 of the *Canada Labour Code*." In the event of such a referral, the adjudicator would then have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal. While the FC confirmed the adjudicator's decision not to determine the complaint on its merits, it ultimately allowed the judicial review application in part only, because it found that the adjudicator had erred by declining jurisdiction in such a way as to preclude the possibility of the complaint being referred back to him by the CHRC.

[37] Therefore, the Board has residual jurisdiction to hear and decide human rights allegations in the context of an unjust dismissal complaint when the Canadian Human Rights Commission (CHRC) exercises its discretion to refer a complaint to the Board in accordance with its statutory authority to do so. In the present complaint, the Board recognizes that it has residual jurisdiction to consider the complaint if the CHRC exercises its statutory discretion to refer the human rights

complaint to the Board on the basis that it could be more appropriately addressed according to the unjust dismissal provisions of the *Code*.

IV. Conclusion

[38] The Board declines to allow the complainant to amend his complaint to withdraw his allegations related to his request for a religious exemption. Given its finding that another procedure for redress is available to the complainant under the Act, the Board concludes that section 242(3.1)(b) of the *Code* applies to deprive it of jurisdiction to consider the unjust dismissal complaint.

A handwritten signature in black ink, appearing to read "Jennifer Webster". The signature is written in a cursive style with a large initial "J".

Jennifer Webster
Vice-Chairperson